APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
80 Civ. 3809
(RLC)

SOLARGEN ELECTRIC MOTOR CAR CORP., and
SOLARGEN ELECTRONICS, LTD.,

Plaintiffs,

— against —

AMERICAN MOTORS CORPORATION,
AMERICAN MOTORS SALES CORPORATION,
and GENERAL MOTORS CORPORATION,

Defendants.

APPEARANCES

STEVEN J. ROMER
Attorney for Plaintiffs
18 East 48th Street
New York, New York 10017
STEVEN J. ROMER,
EVELYN F. COHN
Of Counsel

SULLIVAN & CROMWELL
Attorneys for Defendants
American Motors Corp. and
American Motors Sales Corp.
125 Broad Street
New York, New York 10004
ROBERT J. KATZ
WILLIAM P. STIMSON
Of Counsel

JOHN J. HIGGINS
Attorney for Defendant
General Motors Corp.
767 Fifth Avenue
New York, New York 10153

ROBERT C. WEINBAUM
GEOFFREY S. WALKER
Of Counsel

CARTER, *District Judge*

OPINION

Plaintiffs in this antitrust action are two small interrelated companies specializing in the production of electric motor vehicles and their components. Plaintiffs, hereafter referred to as "Solargen," have brought suit against American Motors Corporation and American Motors Sales Corporation ("the American Motors defendants," "American Motors") for breach of contract and for violation of the Sherman Act, 15 U.S.C. §1, *et seq.* The American Motors defendants have moved pursuant to Rule 56, F.R.Civ.P., for partial summary judgment dismissing counts one through eight of the complaint,[1] these stemming from an abortive transaction in which Solargen attempted to purchase 3,000 motorless Concord vehicles ("Concord gliders") at a price of approximately $3,000 per vehicle. Solargen alleges that the American Motors defendants reneged on a binding agreement to sell at that price, raised the price unjustifiably to

[1]Count nine is not asserted against American Motors. Counts ten through thirteen pertain to a circumscribed issue closely related to American Motors' counterclaims. They are not addressed by this motion, but rather will be responded to in conjunction with American Motors' counterclaims against Solargen.

American Motors has moved in the alternative to dismiss the complaint pursuant to Rule 11, F.R.Civ.P. Dismissal in accordance with Rule 11, F.R.Civ.P. must be predicated on a finding of plaintiff's (and its attorney's) subjective bad faith in bringing the action. *Nemeroff* v. *Abelson*, 620 F.2d 339, 350 (2d Cir. 1980). In view of our disposition of American Motors' Rule 56 motion, we need not reach the issue of whether Solargen's action was brought in bad faith.

$4,593 per vehicle, and then following Solargen's acceptance of the higher price, delayed delivery of the vehicles unnecessarily. Solargen further alleges that the price increase and the delays were the result of pressure from defendant General Motors Corporation ("General Motors," "GM"), and that by acting in this manner for the purpose of sabotaging Solargen's prospects of commercial success, American Motors were engaging in a conspiracy with GM in violation of the Sherman Act. American Motors denies that it had any contact with General Motors regarding the Solargen transactions, that it had ever agreed to sell Concord gliders for any price less than $4,593, or even provided any basis for Solargen reasonably to rely upon a lower figure, or that it had ever caused any intentional or unnecessary delays in the delivery of Concord vehicles.

Solargen has brought suit against General Motors for a plethora of alleged abuses, including, *inter alia*, activities of commercial espionage carried on by GM consultant Robert Keyes against Solargen, bribery of Stanley Caulder (a scientist), Herbert Weisbaum (a TV reporter) and Dean Walters (a TV cameraman) for the purpose of disseminating unfavorable publicity about Solargen, intimidation of Solargen's potential suppliers, General Electric and American Motors among them, and deliberately making false claims to the public about GM's expected progress in producing electric vehicles. These allegations are presented under the legal rubric of conspiracy and monopoly claims within the meaning of Sections 1 and 2 of the Sherman Act, as well as the common law torts of intentionally destroying a business, inducing breach of contract, and the prima facie tort of "unethical conduct." General Motors has moved pursuant to Rule 56, F.R.Civ.P., for summary judgment dismissing all claims against it.[2]

Both the American Motors' motion for partial summary judgment and the General Motors' motion for summary judgment

[2]General Motors has also filed a Rule 11 motion, F.R.Civ.P., for dismissal of all claims against it. We decline to address this motion for reasons similar to those expressed in footnote 1, *supra*.

are granted. The breach of contract claims against American Motors are dismissed because careful review of the documents submitted to the court shows that there was never a contract for sale of Concord gliders at a price of $3,000 apiece, that Solargen had no reasonable basis on which to rely upon any price lower than $4,593, and that delays in the delivery of the gliders were not the fault of American Motors. The conspiracy claims against American Motors are dismissed for the same reason that all claims against General Motors are dismissed—notwithstanding the completion of substantial discovery by Solargen, there is no evidence in support of the claims and there is substantial evidence to the contrary.

The breach of contract claim against American Motors stems from their refusal to deliver Concord gliders at a price of $3,000 each. American Motors and Solargen, represented by its attorney Steven J. Romer, began negotiations over the sale of Concord gliders during the summer of 1979. Solargen has submitted affidavits stating that Romer came to believe that a binding contract for the sale of 3,000 gliders at $3,000 apiece existed as of the end of July, 1979, and that other Solargen employees relied upon Romer's belief in making plans for the production of Solargen electric vehicles.

There is, however, no evidence that Romer's reliance on the $3,000 price was at all reasonable, or that American Motors ever made or accepted an offer at that price. Documents submitted to the court show that American Motors explicitly left open the price even in its July 31 draft of the proposed agreement with Solargen. No price quotation was delivered by American Motors until the figure of $4,593 per vehicle was approved by its senior management and mailed to Solargen on September 5. Indeed, no price quotation could have been delivered earlier because it was only in late August that Solargen finalized its choice of standard and optional equipment to be included in the gliders.

Throughout the summer Romer's negotiations were conducted

principally with Robert J. Swaim, Manager of American Motors' Engine and Component Sales Department ("E & CS"), and William M. Bain, E & CS' regional sales manager for the Eastern United States. Bain and Swaim both attest that they never even suggested that the gliders might be available at a price of $3,000. Rather, they remained silent as to price, stating only that it would have to be determined later. Both the July 31 proposed agreement and repeated statements of Bain and Swaim explicitly informed Romer that any negotiated arrangement would have to be approved by American Motors' top senior management before it could become operative. Accordingly even if Bain or Swaim had reinforced Romer's mistaken belief in a price of $3,000, Romer should have known that he could not rely upon their statements to bind American Motors.

Solargen's assertion of unreasonable delays by American Motors in delivering Concord gliders is clearly without merit. The only substantial delay came in November when Solargen itself sought to defer future shipments for the months of December and January, and refused to accept delivery of 83 gliders that had been shipped. While American Motors' decision to crash test Solargen vehicles may have caused a few days' delay, the purpose of such test was to insure that the vehicles were in compliance with federal safety standards. Moreover, Romer had been informed in June that such tests would be necessary unless Solargen obtained a waiver of the official safety requirements. No waiver was obtained, hence American Motors was entirely correct in requiring the tests. Needless to say, when a party's conduct is totally above reproach, it cannot form the basis of an action against the party in either contract or antitrust.

Solargen's allegations of a conspiracy spearheaded by General Motors are without support. As to the claim of conspiracy, all American Motors' personnel who played a significant role in the Solargen transactions categorically deny having had any contact whatever with General Motors or its representatives. Similarly, General Motors' management deny all involvement

in the Solargen-American Motors business dealings. Solargen's only evidence in support of this alleged conspiracy consists of two things: the fact that General Motors supplies American Motors with many auto parts and therefore would have had the capacity to coerce American Motors economically, and the fact that when Romer expressed his suspicions of a GM-based conspiracy to Bain and Swaim they did not emphatically deny the possibility. Neither fact provides Romer with any "affirmative indication that his version of the facts is not fanciful." *Quinn* v. *Syracuse Model Neighborhood*, 613 F.2d 438, 445 (2d Cir. 1980). Although Rule 56 requires that established facts be viewed in the light most favorable to the nonmoving party, the rule is not intended "to preserve purely speculative issues of fact for trial." *Watson* v. *Southern Railway Co.*, 420 F. Supp. 483, 485 (D.S.C. 1975), *aff'd without opinion*, 542 F.2d 1170 (4th Cir. 1976).

Plaintiffs' other allegations against General Motors fare no better when the voluminous depositions and affidavits are examined for factual support. Romer's assertion that Weisbaum, Walters and Calder were all bribed by General Motors rests on bare suspicion and nothing more. All three deny unequivocally having received a valuable consideration from General Motors or having discussed their evaluation of Solargen's product with General Motors.

The allegation that GM consultant Robert Keyes was a commercial spy who illicitly gathered confidential trade secrets is asserted with relish, but Solargen is unable to specify even a single instance of illegal conduct by Keyes, whose greatest act of espionage appears to have been meetings with the Romer brothers wherein he obtained publicly available information about Solargen. Plaintiffs' suspicions are fueled primarily by a document in which a GM employee referred to Keyes's apparent relief that his name had not come up in a certain meeting. While this may titillate those prone to suspicion, it does not by itself justify going to trial on allegations of commercial espionage. Also without support are Solargen's claims that GM coerced suppliers to cease doing business with Solargen.

Plaintiffs in this case have made a number of wild accusations, all of them unsupported. Defendants' task in gathering evidence against all the accusations has been substantial. It is with some temerity that Romer argues: "It is inconceivable that no material issues of fact can be found in the twenty-five pounds of paper submitted by GM in support of its summary judgment motion." (Solargen memorandum in opposition to General Motors Motion at 25)

The Supreme Court has stated that litigants' rights to trial on their claims should not be extended "to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 290 (1968).

While most[3] of Solargen's allegations against General Motors would be actionable if supported factually, they lack even a modicum of evidentiary support to justify the expense, *see Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979), of going to trial. For this reason General Motors' motion for summary judgment is granted, and all claims against General Motors are dismissed, as are counts one through eight of the complaint against the American Motors defendants.

IT IS SO ORDERED.

Dated: New York, New York
September 15, 1981

ROBERT L. CARTER
U.S.D.J.

[3]Solargen's allegations that GM knowingly exaggerated the successes of its experimental battery program to the public do not constitute a valid cause of action that Solargen has standing to bring. In addition, these allegations, like the others in the complaint, are factually unsupported.

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of May, One Thousand Nine Hundred and Eighty-two.

PRESENT:

HON. WILLIAM H. TIMBERS, Circuit Judge
HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge
HON. AMALYA L. KEARSE, Circuit Judge

80-3809
CARTER
ORDER
81-7724

SOLARGEN ELECTRIC MOTOR CAR CORP., and SOLARGEN ELECTRONICS LTD.,

Plaintiffs-Appellants,

v.

AMERICAN MOTORS CORPORATION, AMERICAN MOTORS SALES CORPORATION,

Defendants,

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties,

it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appellants Solargen Electronics Limited and Solargen Electric Motor Car Corporation, interrelated companies specializing in developing and producing electric motor vehicles, appeal from an order of the United States District Court for the Southern District of New York (Carter, J.) granting summary judgment in favor of General Motors Corporation on appellants' claims of conspiracy and monopolization in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §1, 2, and on the common law tort claims of intentional destruction of business and inducement to commit a breach of contract.

Appellants have failed to show the relevant market or submarket necessary to state a cause of action under section 2 of the Sherman Act. *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 840 (2d Cir. 1980). Neither have appellants pointed to any credible evidence which supports their allegation that General Motors conspired with American Motors to prevent Solargen's entry into the electric car market.

Appellants' common law tort claims are also without evidentiary support. Solargen President Steve Romer's self-serving memoranda concerning an alleged oral agreement with American Motors would not be admissible into evidence and are therefore entitled to no weight. Fed. R. Civ. Proc. 56(e). In the absence of a contract with American Motors, General Motors cannot be guilty of inducing a breach of contract. Assuming for the argument that there was a binding contract, appellants have not demonstrated any conduct on the part of General Motors which induced its breach. Romer is not prepared to prove that any of the other actionable conduct alleged of General Motors actually occurred.

The district court did not err in granting summary judgment where after extensive discovery appellants have produced no

"significant probative evidence tending to support the complaint." *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 290 (1968).

Affirmed.

Hon. William H. Timbers

Hon. Ellsworth A. Van Graafeiland

Hon. Amalya L. Kearse

Francis X. Guidliart

APPENDIX B

Section 1 of the Sherman Anti-Trust Act

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreement shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Section 2 of the Sherman Anti-Trust Act

§2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishment in the discretion of the court.

July 2, 1890, c. 647, §2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

Section 4 of the Clayton Anti-Trust Act

§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, §4, 38 Stat. 731.